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**In the Supreme Court of the United States**

OCTOBER TERM, 1976

MARTIN R. HOFFMANN, SECRETARY OF THE ARMY,  
APPELLANT

v.

LOUIS J. FIOTO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF FOR THE APPELLANT**

ROBERT H. BORK,  
*Solicitor General,*

REX E. LEE,  
*Assistant Attorney General,*

KEITH A. JONES,  
*Deputy Solicitor General,*

STEPHEN L. URBANCZYK,  
*Assistant to the Solicitor General,*

WILLIAM KANTER,  
EDWIN E. HUDDLESON, III,  
*Attorneys,*

*Department of Justice,  
Washington, D.C. 20530.*

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## BRIEF FOR THE APPELLANT

### OPINION BELOW

The opinion of the district court (J.S. App. A, pp. 1a-8a), which was later amended (J.S. App. B, pp. 9a-10a), is reported at 409 F. Supp. 831.

### JURISDICTION

The judgment of the three-judge district court, holding unconstitutional and in effect enjoining enforcement of 10 U.S.C. 1331(c) as it applies to the named appellee and the class he represents, was entered on January 26, 1976 (J.S. App. C, pp. 11a-12a). A notice of appeal to this Court was filed on Febru-

ary 25, 1976 (J.S. App. D, pp. 13a-14a). On April 19, 1976, Mr. Justice Marshall extended the time for docketing the appeal to and including May 25, 1976. The jurisdictional statement was filed on May 24, 1976, and probable jurisdiction was noted on October 4, 1976 (App. 42). The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

#### QUESTION PRESENTED

Whether Congress, when it established in 1948 a program of retirement pay for nonregular military service, acted constitutionally in excluding from eligibility for such retirement pay individuals who had been members of the National Guard or the Reserve before August 16, 1945, but had failed to serve on active duty during either World War.<sup>1</sup>

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall \* \* \* be deprived of \* \* \* property, without due process of law \* \* \*.

Section 302 of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1087, as amended, 10 U.S.C. 1331, provides in pertinent part:

<sup>1</sup> If, contrary to the position taken in this brief, the Court holds that the statutory exclusion is unconstitutional, a further question is presented concerning the power of the district court to enter a judgment against the Secretary of the Army for retirement pay retroactive to the date of retirement. For reasons that are explained below (pp. 21-25, *infra*), however, that question should first be considered by the district court on remand.

(a) Except as provided in subsection (c), a person is entitled, upon application, to retired pay computed under section 1401 of this title, if—

(1) he is at least 60 years of age;

(2) he has performed at least 20 years of service computed under section 1332 of this title;

(3) he performed the last eight years of qualifying service while a member of any category named in section 1332(a)(1) of this title, but not while a member of a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve; and

(4) he is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.

\* \* \* \* \*

(c) No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332(a)(1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947, or unless he performed active duty (other than for training) after June 26, 1950, and before July 28, 1953.

#### STATEMENT

1. The Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1081, as

amended, 10 U.S.C. 1331 *et seq.*, established a program of retirement pay for nonregular military servicemen, i.e., reservists and national guardsmen, who satisfy certain age and service requirements. In general, the Act provides retirement pay to individuals who have reached the age of 60 and have performed at least 20 years of qualifying service. 62 Stat. 1087, 10 U.S.C. 1331(a).<sup>3</sup> However, the Act excluded from eligibility any individual who, before August 16, 1945, was a member of the nonregular military service "unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947." 70A Stat. 102, 10 U.S.C. (1952 ed., Supp. IV) 1331(c); see 62 Stat. 1087-1088.

Thus, as originally enacted, the Act excluded from eligibility for retirement pay individuals who had been members of the nonregular military service before August 16, 1945, but had failed to serve on active duty during either World War. The Act was subsequently amended in 1958 to remove the eligibility bar for such individuals if they had later served on active duty during the Korean War. 72 Stat. 702, 10 U.S.C. 1331(c).

2. The named appellee, Louis J. Fioto, served in the United States Army National Guard for seven

<sup>3</sup> An individual's years of qualifying service are computed by adding the number of years of service performed before July 1, 1949, in one of several specified armed forces, reserve, or militia units, to the number of one-year periods after July 1, 1949, in which the individual has been credited with at least 50 points pursuant to a statutorily prescribed system that, in general, measures the extent of an individual's participation in military service. 10 U.S.C. 1332.

years prior to 1945 (from 1933 to 1940), but he did not serve on active duty during either World War (App. 5, 15-16).<sup>3</sup> Fioto rejoined the National Guard after the end of World War II and served for slightly more than 20 years, until his honorable discharge in 1967, but he did not serve on active duty during the Korean War (App. 11, 13, 15-16).

Relying on this nonregular military service, Fioto applied to the Department of the Army for retirement pay benefits in 1967 and again in 1974 (App. 13, 21-22). On both occasions his application was denied on the basis of the Act's explicit exclusion of individuals such as Fioto from eligibility for retirement pay (App. 15-16, 27, 37).<sup>4</sup>

Following the denial of his second application, Fioto commenced this action in the United States District Court for the Eastern District of New York, on behalf of himself and others similarly situated, seeking injunctive relief and a money judgment for

<sup>3</sup> The opinion of the district court states that Fioto's failure to serve in World War II was "[d]ue to injuries resulting from an automobile accident in 1941 \* \* \*" (J.S. App. A, p. 2a). There is, however, no support for this statement in the record. Furthermore, Fioto's Army personnel record, which was not introduced in evidence but relevant parts of which we have lodged with the Clerk of the Court, shows that when Fioto reenlisted in the National Guard in 1947, and periodically thereafter, he attested, subject to the sanctions imposed by 18 U.S.C. 1001, that he had never been rejected for military service for medical reasons and had never been hospitalized (except in 1949) as a result of an accident. Moreover, an alleged automobile accident in 1941 would not explain Fioto's withdrawal from the National Guard in 1940.

<sup>4</sup> The latter denial was by the Army Board for the Correction of Military Records in September 1974 (App. 27).

retirement pay retroactive to the date of his retirement, on the ground that the eligibility bar of 10 U.S.C. 1331(c) "violate[s] equal protection principles of the Due Process Clause of the Fifth Amendment" (App. 9). The action was certified as a class action pursuant to Rule 23, Fed. R. Civ. P.,<sup>5</sup> and a three-judge court was convened under 28 U.S.C. 2282 (App. 35).

On cross-motions for summary judgment, the district court held that, as applied to Fioto and the class he represents, 10 U.S.C. 1331(c) violates the requirements of equal protection inherent in the Due Process Clause of the Fifth Amendment (J.S. App. A, p. 5a). The court reasoned that the application of the statutory eligibility bar to appellee and the other members of the class "bears no rational relationship to the legislative objectives which led to the enactment of [the Act]" (*ibid.*).<sup>6</sup>

The court ordered that Fioto "henceforth be placed on the Army's retirement rolls" (J.S. App. C, p. 12a) and be paid "all retirement benefits which have accrued since his honorable discharge and which have

<sup>5</sup> The class was defined as all "persons at least 60 years of age who have performed 20 years of service computed under 10 U.S.C. § 1332 since August 16, 1945 and otherwise are entitled to retired pay for nonregular military service, except that before August 16, 1945 they were a Reserve of an armed force or a member of the Army without component and did not perform active duty after April 15, 1917 but before November 12, 1918, or after September 8, 1940 and before January 1, 1947, or after June 26, 1950 but before July 28, 1953, and therefore were disqualified from Retired Pay Benefits by virtue of 10 U.S.C. § 1331(c)" (J.S. App. B, p. 9a).

<sup>6</sup> The court also observed that "[t]here is simply no evidence in the legislative history that Congress intended that any pre-1945 service would create a perpetual bar to future benefits" (J.S. App. A, p. 7a; see *id.*, App. B, p. 10a).

been denied him under the Army's erroneous ruling \* \* \*" (*ibid.*). The court further ordered the Secretary to place all members of the class on the Army's retirement rolls and to grant them retirement benefits (*ibid.*).<sup>7</sup>

#### SUMMARY OF ARGUMENT

This case presents the question whether Congress, when it established a program of retirement pay for nonregular military personnel in 1948, violated the Due Process Clause of the Fifth Amendment by excluding individuals who had been in the militia prior to August 16, 1945, and had not served on active duty during wartime, from eligibility to earn retirement pay. Since there is no suggestion here that the statutory classification at issue is "suspect" or bears upon a fundamental constitutional interest, the appropriate inquiry is whether Congress acted rationally with respect to a permissible legislative purpose. See, *e.g.*, *Weinberger v. Salfi*, 422 U.S. 749, 768-769; *Richardson v. Belcher*, 404 U.S. 78, 81, 84; *Johnson v. Robinson*, 415 U.S. 361, 374. The statutory classification challenged here is constitutional under that standard.

When Congress established the program of retirement pay for nonregular military personnel, its principal purpose was to encourage younger men and men

<sup>7</sup> It is not entirely clear whether the district court's judgment with respect to the unnamed members of the class requires the payment of retirement pay retroactive to the date of retirement. The order states in pertinent part (J.S. App. C, p. 12a) "that the Secretary of the Army place all others in [appellee] Fioto's class on the Army retirement rolls and grant them retirement benefits accordingly," but the order does not state whether it is to be given retroactive effect. Appellee Fioto is currently being paid under the court's order, but the court has stayed its order with respect to the class (App. 39-41).

with wartime experience to enlist or reenlist in the National Guard or Reserve, for the services of such men in the post-war militia were believed essential to the nation's military preparedness. In addition, Congress wished to show the nation's gratitude to those reservists and guardsmen who had served on active duty during one or both of the World Wars.

These underlying rationales did not support extending the opportunity to earn retirement pay to appellees, who had been in the nonregular military service before or during World War II but had failed to serve on active wartime duty. Such individuals possessed neither the youth nor the wartime experience that Congress sought in post-war militiamen. Congress thus had no reason either to encourage appellees' renewed or continued enlistment in the nonregular military service or to reward them for past wartime service. Since the exclusion of appellees from participation in the retirement pay program had a legitimate and rational basis, it should be sustained as constitutional.

#### ARGUMENT

CONGRESS, WHEN IT ESTABLISHED IN 1948 A PROGRAM OF RETIREMENT PAY FOR NONREGULAR MILITARY SERVICE, ACTED CONSTITUTIONALLY IN EXCLUDING FROM ELIGIBILITY FOR SUCH RETIREMENT PAY INDIVIDUALS WHO HAD BEEN MEMBERS OF THE NATIONAL GUARD OR THE RESERVE BEFORE AUGUST 16, 1945, BUT HAD FAILED TO SERVE ON ACTIVE DUTY DURING EITHER WORLD WAR

There can be no question but that appellee Fioto and the class he represents are ineligible for participation in the program of nonregular military retire-

ment pay established by the Army and Air Force Vitalization and Retirement Equalization Act of 1948. Fioto and the unnamed appellees were members of the Reserves or National Guard before August 16, 1945, but they had not served on active duty during either World War. They therefore are expressly barred from eligibility for retirement pay by the unambiguous language of 10 U.S.C. 1331(c):

No person who, before August 16, 1945, was a Reserve of an armed force \* \* \* is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947 \* \* \*.

In holding this provision unconstitutional, the district court proceeded upon the assumption that the statutory exclusion was merely an inadvertent drafting error. Its opinion was based upon an expressed belief that Congress had not intended to bar individuals like Fioto from receiving retired pay altogether but rather had intended only to prohibit them from using pre-1945 service to satisfy the statutory requirement of 20 years' service. See J.S. App. A, pp. 6a-7a. But that belief was grounded, in major part, in a misreading of an insignificant fragment of the legislative history. The court relied upon the statement of a Senate committee staff member that a hypothetical member of the nonregular military service, who in a given year may not have accumulated sufficient "points" to obtain credit for a full year of service (see note 2, *supra*), "would get credit for the points if he got ulti-

mately 20 years' service." <sup>8</sup> Hearings on H.R. 2744 before the Senate Committee on Armed Services, 80th Cong., 2d Sess. 70 (1948) (quoted at J.S. App. A, p. 7a). But the court overlooked the fact that that statement was made solely with respect to a hypothetical reservist or guardsman who had "served 20 years *and served in World War I or II*" (*Senate Hearings, supra*, at 70; emphasis added).<sup>9</sup> The staff member's statement did not apply, and was not intended to apply, to members of the appellee class.

The district court's conclusion that the statutory exclusion "is at odds with Congress' clear purposes and goals in enacting the statutory scheme" (J.S. App. A, p. 8a) also rested on its inability to find any evidence in the legislative history that Congress intended to exclude the appellee class from eligibility to earn retirement pay on the basis of post-1945 service (*id.* at 7a). The unambiguous statutory text, however, constitutes sufficient evidence of that intent.

There is evidence in the legislative history as well that Congress intended the result that its choice of language achieved. For example, in recommending

<sup>8</sup> The staff member's statement refers to the fact that points earned in addition to those required to achieve eligibility for retirement pay under 10 U.S.C. 1331(a)(2) would be credited to the serviceman for the purpose of computing the amount of retirement pay he would receive. See 10 U.S.C. 1333(3) and 1401.

<sup>9</sup> Furthermore, the district court apparently read the staff member's statement as suggesting that, in the computation of retirement benefits, appellees should be entitled to credit for pre-1945 service upon completion of 20 years' post-1945 service. But the point system to which the statement refers pertains only to service after July 1, 1949 (see note 2, *supra*); the statement necessarily had no relevance to pre-1945 service.

that Congress adopt the statutory exclusion challenged here, Major General John E. Dahlquist, the Deputy Chief of the Army Chiefs of Staff, advised the Senate Committee on Armed Service (Senate Hearings on H.R. 2744, *supra*, at 29):

The purpose of reservists was to fight in the war. If he did not fight in the wars we did have, we feel he should not qualify.

The Committee explicitly endorsed this view. The Committee Chairman, Senator Chan Gurney, explained (*id.* at 77):

That [statutory exclusion] \* \* \* make[s] certain that no one who drops out of the Reserves to avoid service in the war is qualified under the bill. This is concurred in by the services and the Reserves.

Thus the statutory exclusion challenged by appellees was not unintended or inadvertent.

This conclusion is confirmed by the 1958 amendment to the Act. That amendment lifted the eligibility bar for those otherwise excluded militiamen who, unlike appellees, performed active duty during the Korean War. See S. Rep. No. 2188, 85th Cong., 2d Sess. 1-2, 3 (1958); H.R. Rep. No. 1984, 85th Cong., 2d Sess. 2, 3 (1958); Hearings on Sundry Legislation Affecting the Naval and Military Establishment (H.R. 781) before the House Committee on Armed Services, 85th Cong., 2d Sess. 7899, 7900 (1958). Congress recognized that individuals who had been militiamen before August 16, 1945, and had later served on active duty in the Korean War should be eligible to earn retirement pay since they "gener-

ally would have been subjected to the same hardships and hazards that were experienced by persons who served during World War I and World War II." S. Rep. No. 2188, *supra*, at 2; H.R. Rep. No. 1984, *supra*, at 3; House Hearings on H.R. 781, *supra*, at 7897. Thus Congress well understood that, in the absence of any remedial legislative action, that group of Korean War veterans would continue to be ineligible for participation in the retirement pay program. By the same token, Congress obviously understood that the appellee class remained excluded from that program.<sup>10</sup>

Thus there is no foundation for the district court's assumption that Congress did not mean what it said in enacting the statutory exclusion in 10 U.S.C. 1331(c). Congress knew what it was doing and did it intentionally.

It also is clear, for the reasons we elaborate below (pp. 13-21, *infra*), that Congress had a legitimate and rational basis for enacting the statutory exclusion. In a case such as this, due process requires no more: the principles of equal protection that inhere in the Due Process Clause of the Fifth Amendment permit the different treatment of different classes of individuals so long as "the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals \* \* \*." *Richardson v. Belcher*, 404 U.S. 78, 84. See also, *e.g.*, *Weinberger v.*

<sup>10</sup> Indeed, Congress has recently considered and failed to act upon several proposals that would have removed the eligibility bar for members of the appellee class. See S. 117, H.R. 5253 (94th Cong., 1st Sess.); cf. H.R. 4104 (94th Cong., 1st Sess.).

*Salfi*, 422 U.S. 749, 768-769; *Johnson v. Robison*, 415 U.S. 361, 374.

A. THE ACT'S PRINCIPAL PURPOSE WAS TO ENCOURAGE YOUNGER MEN AND MEN WITH WARTIME EXPERIENCE TO ENLIST AND REENLIST IN THE MILITIA, AND THE EXTENSION OF ELIGIBILITY FOR RETIREMENT PAY TO APPELLEES WOULD NOT HAVE FURTHERED THAT PURPOSE

Congress' overriding purpose in enacting the 1948 Act was to preserve the militia as an effective secondary fighting force that would be available for immediate activation in time of military need. To achieve that end, it was necessary to make the militia attractive both to men with wartime experience and to the newer generation of men who had been too young to serve during World War II. The program of retirement pay was designed to meet the recruitment needs of the nation's militia by providing an incentive for those men, wartime veterans and the young, to enlist or reenlist.

The district court ascribed a somewhat broader purpose to the Act. It stated that Congress' purpose in establishing a program of retirement pay for non-regular military service was to extend to all militiamen an undifferentiated "incentive to continued service" and thereby "to limit the anticipated post-war exodus from the Reserves and National Guard" (J.S. App. A, p. 6a). But by positing such a broad legislative purpose in such generalized terms the court obscured the basis for the statutory provision under consideration here, which expressly excludes certain individuals from eligibility for participation in the retirement pay program. That Congress did enact the eligibility bar in 10 U.S.C. 1331(c) reveals that its interest in providing a recruitment incentive was

more particularized than that attributed to it by the court.

The legislative history of the Act confirms that Congress desired particularly to encourage enlistments in the militia by younger men and those with wartime experience. The sponsor of the legislation, Congressman Brooks, specifically recognized the importance of providing an incentive for military training by "young men just coming out of the colleges." 94 Cong. Rec. 2495 (1948); see also Hearings on Sundry Legislation Affecting the Naval and Military Establishment (H.R. 2744) before a Subcommittee of the House Committee on Armed Services, 80th Cong., 1st Sess. 3312 (1947). The congressional debates also revealed Congress' awareness of the need "to encourage our young veterans to stay in or join up with the National Guard or the Army and Air Force Reserves," since "[t]hey will enrich these services with their skill and experience for many years to come." 94 Cong. Rec. 2490 (Congressman Miller). As Colonel Melvin J. Maas of the United States Marine Corps Reserve advised the Senate Committee on Armed Services (Senate Hearings on H.R. 2744, *supra*, at 23):

The necessity for this legislation is urgent. The enlistments of hundreds of thousands of our present reservists, already trained with actual wartime experience, begin expiring this year. There is no inducement for them to reenlist at present. We have a formidable backlog, war-trained Reserves, in being now. It behooves us to take vigorous steps immediately to retain that Reserve before it disintegrates. If

we lose that force now, we may not have time at our disposal to replace it later. \* \* \*

See also House Hearings on H.R. 2744, *supra*, at 3304, 3308, 3453, 3460.

Older individuals, like appellee Fioto, who had never seen active wartime duty were reasonably regarded as being potentially less useful as soldiers in the event of wartime activation. Fioto and the other members of the class he represents offered neither the youth nor the wartime experience Congress sought in postwar militiamen. Accordingly, Congress rationally chose not to furnish them with a retirement-pay incentive for reenlistment.

Indeed, Congress' determination not to afford appellees an incentive to remain in or rejoin the militia was especially appropriate in view of their failure to perform active duty during wartime. The purpose of the militia, as it is of the military in general, is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17. Notwithstanding their pre-1945 membership in the militia, individuals like Fioto had not fulfilled the purpose for which a militia or other military service is maintained. Congress therefore understandably saw no reason to encourage their continued or renewed participation in such service. Whether their failure to perform active duty during wartime had resulted from an unwillingness to serve, physical or mental disability, the critical nature of their civilian employment, or some other cause, it was reasonable for Congress to consider this past history in assessing the

likelihood that such individuals would perform active duty during future wars if induced to remain in the nonregular military service by the promise of retirement pay.<sup>11</sup>

Accordingly, while Congress did not exclude from eligibility for retired pay other older individuals who had not fought in World War II, that fact does not render the classification invalid as to former militiamen who already had once failed to assist the militia in carrying out its basic purpose. Congress could properly consider that history in distinguishing between such former militiamen and other potential recruits. Cf. *Marshall v. United States*, 414 U.S. 417. Moreover, in view of the 20 years' service requirement (10 U.S.C. 1331(a)(2)) and the provisions for a mandatory retirement age (e.g., 32 U.S.C. 313; National Guard Reg. 600-200, ¶2-6(b)(4); see 10 U.S.C. 1331(a)(1)), Congress could reasonably believe that there would be relatively few older individuals who had no pre-1945 nonregular military service (and who had not been affected by the general mobilization during

<sup>11</sup> Of course, some of the individuals excluded from eligibility for retirement pay by the Act in 1948 may have been willing and able to perform future active wartime duty. But Congress was not constitutionally required to conform the statutory exclusion more exactly to the physical and mental attributes of separate individuals; Congress was entitled to employ broad statutory classifications, and such classifications did not have to be made "with mathematical nicety." *Dandridge v. Williams*, 397 U.S. 471, 485. Moreover, Congress subsequently amended the Act to extend retirement pay to those otherwise excluded individuals who did in fact serve on active duty during the Korean War. See pp. 11-12, *supra*.

World War II) who could achieve eligibility for retired pay by first enlisting in the militia after 1945.

The district court nevertheless concluded that the statutory exclusion could not constitutionally be applied to those individuals who, like appellees, had served in the militia before 1945, had failed to perform active duty during wartime, but had served for a full 20 years after 1945. The court reasoned that there is now no rational basis for making distinctions as to eligibility for retirement pay among militiamen all of whom have completed 20 years' post-1945 service. It may well be that, viewing events retrospectively, appellees now are as "deserving," in a social welfare sense, as other men who served in the militia for 20 years after 1945 without performing active duty during the Korean War. But that fact, if established, would not detract from the rationality of Congress' decision in 1948 narrowly to tailor the incentive of retirement pay to exclude appellees from the right to earn such pay through future service.

The 1948 Act was principally a compensation statute that created an incentive by extending to certain individuals a promise of payment upon the completion of future service. As such, the Act must be found constitutional if the distinction drawn between those to whom the incentive was offered and those to whom it was not was reasonable at the time of enactment. The legislative judgment, made in 1948, that the recruitment needs of the post-war militia could be met by affirmatively encouraging the enlistment only of veterans, and of men who had not belonged to the militia without performing active wartime service, was

grounded in a practical assessment of the likely future availability of the various categories of potential militiamen for active wartime duty. Nonregular military service remained open to individuals like appellee Fioto, who could fairly be regarded as less likely to perform active wartime duty, but Congress reasonably determined that the interest of the nation in military preparedness did not require that such individuals be encouraged to reenlist through the incentive of retirement pay.<sup>12</sup>

In short, the exclusion of individuals like appellees from eligibility to earn retirement pay reflected considerations of military cost-effectiveness: Congress reasonably determined that the military expenditures that would be incurred by extending the opportunity for retirement pay to such individuals were simply not likely to provide the nation with enhanced preparedness for war. This was a legitimate and rational choice for Congress to have made, and it therefore should be sustained as constitutional.

**B. A SUBSIDIARY PURPOSE OF THE ACT WAS TO REWARD MILITIAMEN WHO HAD SERVED ON ACTIVE DUTY DURING WARTIME, AND APPELLEES HAD NOT SO SERVED**

Congress also adopted the 1948 Act in part to reward those militiamen who had served on active duty

<sup>12</sup> Indeed, the fact that some individuals, such as Fioto and the unnamed appellees, chose to reenlist and to serve for 20 years after 1945, even though they were excluded from eligibility for retirement pay, illustrates that the additional incentive of retirement pay was not necessary to induce them to do so. And certainly appellees cannot claim that the operation of the statute is unduly harsh as to them, for they may be presumed to have known as early as 1948 that they were ineligible for retirement pay; they need not have reenlisted thereafter.

during wartime. Such individuals were included in the retirement-pay program and were permitted to count their pre-1945 years of service in calculating the 20 years' service requirement for eligibility. 10 U.S.C. 1331(c), 1332(a)(1). But there was no basis for any similar show of gratitude to those individuals, such as appellee Fioto, who had been in the nonregular military service before or during World War II and yet had not faced the hardships and dangers of wartime active duty.

There were two related though distinct elements to the congressional view of retirement pay as a reward for past wartime service. To begin with, Congress was of the opinion that a retirement-pay reward should not be extended to individuals who, though available, had failed to come to the nation's defense in its time of need. See Senate Hearings on H.R. 2744, *supra*, at 77. Quite apart from a desire to withhold retirement pay from those who may have deliberately avoided active duty service, however, Congress also wished to demonstrate to the "thousands of men" who were in the Reserve and "who bore their full share of the conflict in two wars," "that this Nation at least is grateful \* \* \*." Senate Hearings on H.R. 2744, *supra*, at 29; 94 Cong. Rec. 2490 (Congressman Miller).<sup>13</sup>

This latter view recognizes the distinction between those who faced the hardships and dangers of wartime

<sup>13</sup> The congressional purpose to reward active duty during wartime was reaffirmed by the 1958 amendment to the Act, which added service on active duty during the Korean War to the exceptions to the eligibility bar of 10 U.S.C. 1331(c). See pp. 11-12, *supra*.

active duty and those who, for whatever reason, did not. In the district court, appellee Fioto asserted that he had been "found medically unqualified when he attempted to enlist in World War II" (Br. 10, note), and therefore, implicitly, that his failure to serve had not been due to any unwillingness on his part. There is no evidence in the record to support this assertion (see note 3, *supra*). But, even if Fioto had been physically unable to serve during the war, that would not alter the fact that he did not confront the dangers and hardships of wartime active duty service or render the statute's application to him invalid. Congress reasonably decided that in extending retirement pay as a reward for past service, it would require that a part of the service be in wartime active duty. See, *e.g.*, Senate Hearings on H.R. 2744, *supra*, at 29.

In thus distinguishing, for purposes of eligibility for retirement pay on the basis of past service, between individuals who had served on active duty during wartime and those who had not, Congress was making virtually the same distinction that this Court sustained as rational in *Johnson v. Robison*, *supra*. In *Robison*, Congress had distinguished between military service and alternative civilian service for purposes of eligibility for educational benefits. In upholding this distinction, the Court noted (415 U.S. at 379):

\* \* \* [T]he disruptions suffered by military veterans and alternative service performers are qualitatively different. Military veterans suffer a far greater loss of personal freedom during their service careers. Uprooted from civilian

life, the military veteran becomes part of the military establishment, subject to its discipline and potentially hazardous duty.

Precisely the same is true of the difference between a reservist or guardsmen who was activated into wartime duty and one who, like appellee Fioto and the other members of his class, was not.

\* \* \* \* \*

For the foregoing reasons, we submit that the exclusion of appellees from eligibility to earn retirement pay was rational and should be sustained as constitutional. But if this Court disagrees, we further contend that the district court lacked power to enter a judgment against the Secretary of the Army for retirement pay retroactive to the date of retirement (see J.S. App. C, p. 12a; note 1, *supra*). The government did not advance this contention in the district court. However, this Court's intervening decision in *United States v. Testan*, 424 U.S. 392, has cast substantial doubt upon whether the Tucker Act confers jurisdiction to entertain that portion of appellees' suit that seeks retroactive retirement pay, *i.e.*, a money judgment against the federal government. Since the issue is jurisdictional, it may of course be raised at any time. But it would be appropriate to afford the district court an opportunity to consider it in the first instance. Accordingly, if this Court should determine, contrary to the position stated in this brief, that 10 U.S.C. 1331(c) is unconstitutional as applied to the appellee class, the Court should vacate the judgment of the district court insofar as it awards retroactive retirement pay and remand that portion of the case for reconsideration in light of *Testan*.

1. Although this suit is brought against the Secretary of the Army, the retroactive award of retirement pay is a money judgment that "would expend itself on the public treasury." *Land v. Dollar*, 330 U.S. 731, 738; see *Dugan v. Rank*, 372 U.S. 609, 620; *Hawaii v. Gordon*, 373 U.S. 57, 58. To that extent, appellees' claim is one for recovery of money from the sovereign. See *Edelman v. Jordan*, 415 U.S. 651; *Ford Motor Company v. Department of Treasury*, 323 U.S. 459. The United States is an indispensable party to such a case. See, e.g., *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 374-375; *Minnesota v. United States*, 305 U.S. 382, 386-388.<sup>14</sup> Moreover, district courts have power to award monetary relief against the government only to the extent that jurisdiction is conferred over actions against the United States by the Tucker Act, 28 U.S.C. 1346(a), which provides in pertinent part that "district courts shall have original jurisdiction \* \* \* of \* \* \* [a]ny \* \* \* civil action or claim against the United States, not exceeding \$10,000

<sup>14</sup> In *Mine Safety Appliances Co. v. Forrestal*, *supra*, plaintiff-appellant sued the Under Secretary of the Navy for injunctive relief to require him to pay money allegedly owing under a contract (326 U.S. at 371-372). The Court stated, in terms that are equally applicable here (*id.* at 374-375):

"The assumption underlying this action is that if the relief prayed for is granted, the government will pay and thus relinquish ownership and possession of the money. In effect, therefore, this is an indirect effort to collect a debt allegedly owed by the government \* \* \*. \* \* \* [T]he sole purpose of the proceeding is to fix the government's and not the Secretary's liability. Thus, \* \* \* the conclusion is inescapable that the suit is essentially one designed to reach money which the government owns. Under these circumstances the government is an indispensable party \* \* \*."

in amount, founded either upon the Constitution, or any Act of Congress \* \* \*." <sup>15</sup>

2. For these reasons, the district court did not have jurisdiction to award retirement pay retroactive to the date of retirement in this suit against the Secretary.<sup>16</sup> But even if the United States had been joined as a party defendant, the claim for an award of retire-

<sup>15</sup> The record shows that from January 1, 1968 (appellee Fioto was honorably discharged from the National Guard on December 9, 1967) until February 28, 1975 (this action was instituted in January 1975), appellee Fioto would have received retirement pay in the amount of \$7,973.45 if he had been eligible for those benefits under 10 U.S.C. 1331 (App. 34).

<sup>16</sup> The mandamus statute, 28 U.S.C. 1361, on which the district court sustained jurisdiction here (J.S. App. A, pp. 3a-5a), merely grants jurisdiction over certain suits for prospective injunctive relief and is not a waiver of immunity for retroactive monetary relief. See *Essex v. Vinal*, 499 F. 2d 226, 231-232 (C.A. 8), certiorari denied, 419 U.S. 1107; *White v. Administrator of General Services Administration*, 343 F. 2d 444, 447 (C.A. 9). See also *United States v. Testan*, *supra*, 401 U.S. at 401 n. 5.

The other jurisdictional bases alleged in appellees' complaint (28 U.S.C. 1331(a); the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, 28 U.S.C. 1343(4); and the Fifth Amendment) do not waive sovereign immunity for purposes of recovery of money. 28 U.S.C. 1331, like the Tucker Act, is not a waiver of sovereign immunity; it merely defines the kinds of cases over which the district courts have jurisdiction. See, e.g., *Beale v. Blount*, 461 F. 2d 1133, 1138 (C.A. 5); *Cotter Corporation v. Seaborg*, 370 F. 2d 686, 692 (C.A. 10). Even if it were assumed that the Administrative Procedure Act confers jurisdiction—an issue now before the Court in *Mathews v. Sanders*, No. 75-1443—at most it would confer jurisdiction only over actions "seeking relief other than money damages" (5 U.S.C. 702, as amended by Pub. L. 94-574, October 21, 1976; emphasis added). No entitlement to monetary relief is created by the Due Process Clause of the Fifth Amendment, and 28 U.S.C. 1343(4) grants jurisdiction only over certain actions (of which the present suit is not one) involving statutes "for the protection of civil rights, including the right to vote."

ment pay retroactive to the date of retirement is one as to which sovereign immunity has not been waived. "The Tucker Act \* \* \* merely confers jurisdiction \* \* \* whenever the substantive right exists." *United States v. Testan, supra*, 424 U.S. at 398. The question whether there is such a "substantive right" "depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained' " (*id.* at 400).

No federal statute creates a substantive right in the appellee class to retroactive retirement pay. The only conceivable statute upon which appellees can rely is the statute at issue in this case, 10 U.S.C. 1331 (see Mot. to Affirm 9, n. 3). But the reason for appellees' lawsuit is that this statute in fact denies them retirement pay. The provisions of 10 U.S.C. 1331(a) and (e) establish an "entitlement" to retirement pay only for those individuals meeting the eligibility requirements of the statute, and appellees by definition are not in this class (see J.S. App. B, p. 9a). In short, insofar as the appellees sought retroactive pay, their suit was one to which the United States had not consented.<sup>17</sup> See *United States v. Sherwood*, 312 U.S. 584.

<sup>17</sup> Although sovereign immunity does not bar suit for prospective injunctive relief where a government officer is acting pursuant to an unconstitutional statute or beyond his statutory powers (see *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682; *Malone v. Bowdoin*, 369 U.S. 643), these exceptions do not pertain to a claim, such as the one here, that would require payment of money by the sovereign. Cf. *Larson v. Domestic & Foreign Commerce Corp.*, *supra*, 337 U.S. at 691 n. 11.

Cf. *Edelman v. Jordan, supra*.<sup>18</sup>

<sup>18</sup> In *Edelman v. Jordan, supra*, the Court considered a class action against state officials to recover, *inter alia*, retroactive benefits that had been unlawfully withheld. The Court reversed the portion of the court of appeals' judgment that permitted recovery of retroactive benefits against the state. Rejecting the plaintiffs' argument that such payments amounted to "equitable restitution," the Court held that retroactive benefits are "in practical effect indistinguishable in many aspects from an award of damages against the State" (415 U.S. at 668), and, therefore, were barred by the sovereign immunity principle of the Eleventh Amendment.

The principles of sovereign immunity applied in *Edelman* under the Eleventh Amendment apply equally to suits against the United States. See *Larson v. Domestic & Foreign Commerce Corp.*, *supra*, 337 U.S. at 687-705; *id.* at 708 (dissenting opinion of Mr. Justice Frankfurter). See also 3 Davis, *Administrative Law Treatise*, § 27.02, p. 548, n. 1 (1958 ed.) :

"The Eleventh Amendment creates sovereign immunity of states in certain suits in the federal courts.

"No difference is discernible in modern law between suits against states in the federal courts, and suits against the United States in federal courts." \* \* \*

**CONCLUSION**

The judgment of the district court should be reversed.

Respectfully submitted.

ROBERT H. BORK,

*Solicitor General.*

REX E. LEE,

*Assistant Attorney General.*

KEITH A. JONES,

*Deputy Solicitor General.*

STEPHEN L. URBANCZYK,

*Assistant to the Solicitor General.*

WILLIAM KANTER,

EDWIN E. HUDDLESON, III,

*Attorneys.*

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